IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES SHAW, BRET D. SCHWARTZ, and STEVE PROMISLO, individually, and on behalf of all persons similarly situated, Plaintiffs, v. DALLAS COWBOYS FOOTBALL CLUB, LTD., NEW YORK FOOTBALL GIANTS, INC., OAKLAND RAIDERS, LTD., PHILADELPHIA EAGLES LIMITED PARTNERSHIP, SAN FRANCISCO FORTY NINERS, LTD., and NATIONAL FOOTBALL LEAGUE, Defendants.	Civil Action No.97-5184

Gawthrop, J. June 19, 1998

M E M O R A N D U M

Plaintiffs are claiming that defendants have combined, in violation of antitrust laws, to fix, raise, maintain, or stabilize the price for satellite broadcasts of National Football League (NFL) games. They allege that these defendants' conduct caused artificially high and noncompetitive prices for NFL satellite broadcasts. Approximately a dozen NFL games are broadcast each week by free television networks, such as NBC or Fox. In any given week, one may watch on free, non-satellite television[1] a few of these games. Which games one may view on

[1]That is to say, commoners can watch the game without having to have their own, personal satellite dish, aimed at the right spot in the sky. One recognizes that, today, nearly all television

free television depends on the local market; for example, Philadelphia Eagles games are always shown on free, network television to fans in Philadelphia. However--to indulge in a totally hypothetical example--Dallas Cowboys fans in Philadelphia will not be able to watch, in Philadelphia, all of the Dallas Cowboys' games.

In addition, one may purchase from the NFL a weekly satellite television package of all the games broadcast nationwide: NFL Sunday Ticket™. Individuals may subscribe to the Sunday Ticket™ program, but they must own a satellite dish antenna and pay an additional fee of $139 per season. Plaintiffs allege that the agreement by the NFL and its members to market the Sunday Ticket™ package has restricted the options available to fans for viewing non-network broadcasts of NFL games, thereby reducing competition and artificially raising prices. Defendants have responded by filing this 12(b)(6) motion to dismiss for failure to state a claim under which relief could be granted, claiming (1) that the Sports Broadcasting Act (SBA or the Act) specifically exempts their conduct from antitrust laws, and, (2) that plaintiffs do not adequately allege the joint action necessary for antitrust liability.

Standard of Review

---

transmissions have at some time been bounced off a satellite, en route from camera lens to TV screen.

Under Fed. R. Civ. P. 12(b)(6), a court should dismiss a complaint only if it finds that the plaintiffs cannot prove any set of facts, consistent with the complaint, which would entitle them to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). In making this determination, the court must accept as true all allegations made in the complaint, and all reasonable inferences that may be drawn from those allegations. Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must view these facts and inferences in the light most favorable to the plaintiff. Id.

Discussion

Section 1 of the Sherman Act states, "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. This concededly broad definition has been tempered somewhat by the case law. The Supreme Court has pronounced a "rule of reason," which provides that only agreements which unreasonably restrain trade are illegal, see e.g., Standard Oil v. U.S., 221 U.S. 1 (1911), since to strike all agreements which restrain trade would render business impossible. Under the current state of the law, to make out a Section 1 violation, plaintiffs must prove three elements: a contract, combination, or conspiracy; a restraint of trade; and an effect on interstate commerce. Fuentes v. South Hills

Cardiology, 946 F.2d 196, 198 (3d Cir. 1991).

Plaintiffs claim that there is an agreement among the defendants to limit the broadcast of professional football games. They allege that this agreement restricts output of televised football games and artificially increases the price for such games. Plaintiffs aver, and defendants do not dispute, that any individual can only see two or three professional football games per week on free, network TV, but that any individual may subscribe to the Sunday Ticket™ program for monthly satellite access fees and an additional fee of $139 per season.

I turn now to the first argument by defendants: that their actions are completely exempt from antitrust scrutiny under the Sports Broadcasting Act, 15 U.S.C. § 1291.

I. Antitrust Exemption

The Sports Broadcasting Act was passed in 1961 specifically to reverse a district court ruling[2] that the NFL's sale of a games package to a television network violated § 1 of the Sherman Antitrust Act. See generally, U.S. Football League v. National Football League, 842 F.2d 1335, 1346-47 (2d Cir. 1988) (discussing history of agreements between the NFL and the major television networks and history of the SBA). The SBA exempts the sale of certain broadcast rights from the antitrust laws:

[2]United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

> any agreement by or among persons engaging in or conducting the organized professional team sports of football, . . . , by which any league of clubs participating in professional football . . . contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, . . . engaged in or conducted by such clubs.

15 U.S.C. § 1291.

The contention between the parties in this case lies in the meaning of the phrase "rights . . . in the sponsored telecasting." Plaintiffs maintain that this phrase pertains only to broadcasts that have formal sponsors, who presumably run commercial advertisements, paying a fee to the station for that privilege, so that it is not necessary and not required that the viewer pay money in order to watch the program. With the broadcast fee being subsidized by the sponsors, therefore, the games are free to the public. Defendants, on the other hand, argue that this phrase exempts from antitrust liability not only their agreements to sell rights to broadcast certain games with formal sponsorship, but also exempts agreements to sell broadcasts of the same games through a non-sponsored medium. They argue that the Sunday Ticket™ package is simply a sale of their residual rights in the games which were broadcast on "sponsored telecasts," and, so, the package is a sale of "part of the rights" to the "sponsored telecasts." Their action in selling Sunday Ticket™ falls within the SBA, they claim, because

they still own a partial right to the games broadcast by the free networks, and Sunday Ticket™ is simply a vehicle for selling these retained rights.

The Supreme Court construes exceptions to the antitrust laws narrowly. See, e.g., Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1991). In Pireno, the Court concluded that the Sherman Act stands for Congress's commitment to a free-market system and open competition, and that thus any laws that circumvent this goal must be closely examined. Id. The Sports Broadcasting Act is an exception to the general antitrust laws and, so, must be narrowly applied. See Chicago Pro. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 671 (7th Cir. 1992), cert. den., 506 U.S. 954 (1992) (regarding SBA, "What the industry obtained, the courts enforce; what it did not obtain from the legislature--even if similar to something within that exception--a court should not bestow.").

With these restrictive guidelines in mind, I turn to the task of determining the meaning of the Act. In so doing, I heed the Supreme Court's injunction to "look first to the statutory language and then to the legislative history if the statutory language is unclear." Blum v. Stenson, 465 U.S. 886, 896 (1984); Murphy v. Dalton, 81 F.3d 343, 350 (3d Cir. 1996).

A. What does the term "sponsored telecasting" mean?

The question arises as to what is the meaning of the phrase

“sponsored telecasting.” The term “sponsor” has many definitions, ranging from a legislator proposing a bill, to a godparent presenting a baby for baptism. To the extent that these football games, and their consequent electronic depictions, are all played under the aegis of the NFL, that entity could arguably be called their sponsor. But the more apt definition is “[o]ne that finances a project or an event carried out by another person or group, especially a business enterprise that pays for radio or television programming in return for advertising time.” The American Heritage Dictionary of the English Language 17411 (3rd ed. 1992). Clearly, that is the sort of sponsorship of which we speak here. Only telecasting which is performed with such a sponsor can meet the meaning of the phrase "rights . . . in the sponsored telecasting."

Defendants argue that these broadcasts are nevertheless "sponsored telecasting," since when they were first put on the air, it was in the more traditional corporate-sponsored commercial context, rather than the pre-paid, commercial-free-package context. I, however, look to the broadcast which goes to these particular plaintiffs, not its earlier sponsored incarnation. Were the rule otherwise, the NFL could circumvent the statutory confines, nullify the statutory scheme, simply by always using earlier broadcasts with commercials. I do not believe that to have been Congress's intent; to construe the

statute that way would cause the statute to self-destruct--an absurd result.

Since the defendants disagree that this is the plain meaning of the statute, however, it becomes appropriate to look at the record to see what Congress thought it was enacting.

1. Legislative History

There are three pieces of legislative history which, taken together, show that the SBA does not exempt the actions here challenged, that is, the NFL's sale of Sunday Ticket™. First, the SBA was enacted to reverse the decision of Judge Grim, of this court, in which he held that a contract to sell the NFL's pooled-rights to professional football games to CBS violated § 1 of the Sherman Act. U.S. Football League, 842 F.2d at 1347 (citing S.Rep. No. 1087, 87th Cong., 1st Sess. 1, reprinted in 1961 U.S. Code Cong. & Admin. News 3042 and discussing decision in United States v. National Football League which led to the enactment of the SBA). Thus SBA's legislative context and the specific concern it sought to address was focussed upon but one target: the sale of games to a sponsored television network.

Second, the legislative report on the SBA states that "[t]he exemption provided by Section 1 of H.R. 9096 [the SBA] applies to the sale or transfer of rights in the sponsored telecasting of games." The report then states, "The bill does not apply to closed circuit or subscription television." Telecasting of

Professional Sports Contests: Hearing before the Antitrust Committee of the House Committee on the Judiciary on H.R. 8757, 87th Cong. 1st Sess. at 4 (Sept. 13, 1961).

Finally, the NFL itself admitted that the SBA does not exempt the agreement at issue. During its passage through Congress, the House of Representatives heard testimony from then-NFL Commissioner Pete Rozelle concerning the bill: "You understand, do you not, Mr. Rozelle, that this Bill covers only the free telecasting of professional sports contests, and does not cover pay T.V.?" Mr. Rozelle responded under oath, "Absolutely." Id. at 36 (Aug. 28, 1961).

2. Case Law Precedent

The issue in this case--whether satellite broadcasting constitutes "sponsored telecasting"--is one of apparent first impression. There seems to be no direct case law; there is but one case that is even obliquely on point, Chicago Pro. Sports Ltd. Partnership v. NBA, 808 F. Supp. 646 (N.D. Ill. 1992). There, a television station and the Chicago Bulls, a professional basketball club, brought an antitrust challenge against the NBA for its contract with Turner Network Television (TNT), a cable television network which also broadcast some commercials. The contract contained a clause restricting broadcasts of NBA games by the plaintiff television station on nights when TNT also broadcast the games. Id. at 647. The NBA argued that its

agreement with TNT was exempt from antitrust scrutiny because TNT constituted "sponsored telecasting" and thus the agreement fell within the SBA's exemption. Id. at 649. The court held that TNT was more like subscription television than like sponsored telecasting, and so a contract with TNT was not exempt from the Sherman Act under the SBA. Significantly, the court based its decision on three factors: 1) that viewers must pay to receive TNT, 2) that TNT derived its revenue predominantly from subscriptions rather than advertising revenues, and 3) that the legislative history showed that sponsored telecasting was limited to free commercial television. Id. at 649-650. This tends to support the conclusion I have reached in this case.

The Sports Broadcasting Act did not pronounce a broad, sweeping policy, but rather engrafted a narrow, discrete, special-interest exemption upon the normal prohibition on monopolistic behavior. In the SBA, the NFL got what it lobbied for at the time. It cannot now stretch that law to cover other means of broadcast. Accordingly, I find that the defendants' conduct is not exempt from antitrust liability under the SBA.

II. Conspiracy

As to defendants' second argument, that there can be no concerted action because the NFL alone sold NFL Sunday Ticket™, precedent suggests otherwise. In L.A. Mem'l Coliseum Comm'n v. NFL, the court rejected the 'single entity' defense of the NFL

against a § 1 claim, holding that the NFL alone could still meet the requirement of concerted action. 726 F.2d 1381, 1390 (9th Cir. 1984), cert. den., 469 U.S. 990 (1984). Even given that pro-plaintiff precedent, this case goes beyond the one-defendant-created action of the Coliseum case. Plaintiffs do not allege that the NFL acted alone to violate the Sherman Act. Rather, they complain that all the member clubs, through and with the NFL, have conspired to restrain the trade in televised football. Thus, they have adequately pled plural participation.

Finally, defendants claim that the antitrust complaint is too vague and conclusory to hurdle Rule 12(b)(6). In Leatherman v. Tarrant County Narcotics Intell. and Coordination Unit, the Supreme Court held, albeit in another substantive-law context, that Federal Rule of Civil Procedure 8(a) establishes a "liberal system of 'notice pleading'" which "do[es] not require a claimant to set out in detail the facts upon which he bases his claim." 507 U.S. 163, 168 (1993). Greater particularity in pleading is only required for allegations of fraud and mistake. Id. Under Rule 8(a) the plaintiff is not required to specifically describe the full array of facts as to how a conspiracy came about. It is sufficient for the plaintiff to identify "the conspiracy's participants, purpose and motive." Fuentes, 946 F.2d 196, 202 (3d Cir. 1991). The plaintiffs here have specifically pled the participants (the NFL and its member clubs), the purpose (to

restrict output and so raise prices), and the motive (monetary gain to the defendants). Plaintiffs allege an agreement among the clubs and the NFL; they allege that the agreement unreasonably restricts output of non-network broadcasts of professional football, thus raising the market price to tune into those games. That is enough to state a claim that the agreement is illegal. Hence, the defendants' motion to dismiss must be denied.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES SHAW, BRET D. SCHWARTZ, and STEVE PROMISLO, individually, and on behalf of all persons similarly situated, Plaintiffs, v. DALLAS COWBOYS FOOTBALL CLUB, LTD., NEW YORK FOOTBALL GIANTS, INC., OAKLAND RAIDERS, LTD., PHILADELPHIA EAGLES LIMITED PARTNERSHIP, SAN FRANCISCO FORTY NINERS, LTD., and NATIONAL FOOTBALL LEAGUE, Defendants.	Civil Action No.97-5184

O R D E R

AND NOW, this day of June, 1998, Defendants' Motion to Dismiss is DENIED.

BY THE COURT:

_____

Robert S. Gawthrop, III J.